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IN THE
Supreme Court of the United States
October Term, 1993

CONSUMER FEDERATION OF AMERICA, MCI COMMUNICATIONS CORPORATION, NEWSPAPER ASSOCIATION OF AMERICA, INFORMATION TECHNOLOGY ASSOCIATION OF AMERICA, ASSOCIATION OF DIRECTORY PUBLISHERS, COMMERCE CLEARING HOUSE, INC., COX ENTERPRISES, INC., DIALOG INFORMATION SERVICES, INC., GE INFORMATION SERVICES, INFORMATION INDUSTRY ASSOCIATION, INTERNATIONAL COMMUNICATIONS ASSOCIATION, MCGRAW-HILL, INC., MEAD DATA CENTRAL, INC., NATIONAL ASSOCIATION OF BROADCASTERS, NATIONAL CABLE TELEVISION ASSOCIATION, INC., PRODIGY SERVICES COMPANY, TOWARD UTILITY RATE NORMALIZATION, WEST PUBLISHING COMPANY, THE WISCONSIN CITIZENS' UTILITY BOARD, INC.
Petitioners,

v.

UNITED STATES OF AMERICA, AMERITECH, BELL ATLANTIC CORPORATION, BELLSOUTH CORPORATION, NYNEX CORPORATION, PACIFIC TELESIS GROUP, SOUTHWESTERN BELL CORPORATION, U S WEST, INC., *ET AL.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT REGIONAL BELL OPERATING COMPANIES

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RULE 29.1 STATEMENT

Respondent Regional Bell Operating Companies ("BOCs") are publicly held corporations principally in the business of providing communications services and products to the general public.

Ameritech. Ameritech Corporation is a publicly held corporation which owns the following subsidiaries which have securities in the hands of the public:

Illinois Bell Telephone Company
Indiana Bell Telephone Company, Inc.
Michigan Bell Telephone Company
The Ohio Bell Telephone Company
Wisconsin Bell, Inc.
Telecom Corporation of New Zealand Limited

Bell Atlantic. Bell Atlantic Corporation is a publicly held corporation which owns the following subsidiaries which have securities in the hands of the public:

The Bell Telephone Company of Pennsylvania
The Chesapeake and Potomac Telephone Company
The Chesapeake and Potomac Telephone Company of Maryland
The Chesapeake and Potomac Telephone Company of Virginia
The Chesapeake and Potomac Telephone Company of West Virginia
The Diamond State Telephone Company
New Jersey Bell Telephone Company
Bell Atlantic Systems Leasing International, Inc.
Bell Atlantic Tricon Leasing Corp.
Bell Atlantic Financial Services, Inc.
Bell Atlantic Mobile Systems, Inc.
Bell Atlantic Network Funding Corp.
Bell Atlantic Capital Funding Corp.
Bell Atlantic Telecom Corporation of New Zealand Limited

BellSouth. BellSouth Corporation is a publicly held corporation, and its wholly owned subsidiary, BellSouth Telecommunications, Inc., both in its own name and in the names of its predecessors, Southern Bell Telephone and Telegraph Company, and BellSouth Capital Funding Corporation, have securities in the hands of the public. BellSouth Capital Funding Corporation—Australia Limited, a partially owned subsidiary of BellSouth Capital Funding Corporation, has issued securities that are in the hands of the public.

NYNEX. NYNEX Corporation is a publicly held corporation. It has no publicly held parent, subsidiary or affiliate.

Pacific Telesis Group. Pacific Telesis Group is a publicly held corporation, and its subsidiaries Pacific Bell and Nevada Bell have securities in the hands of the public.

Southwestern Bell. Southwestern Bell Corporation is a publicly held corporation, and its subsidiaries Southwestern Bell Telephone Company and Southwestern Bell Capital Corporation have securities in the hands of the public.

U S WEST. U S WEST, Inc. is a publicly held corporation which owns the following subsidiaries which may have securities in the hands of the public:

The Mountain States Telephone and Telegraph Company
Northwestern Bell Telephone Company
Pacific Northwest Bell Telephone Company
U S WEST NewVector Group, Inc.
U S WEST Capital Funding, Inc.
U S WEST Financial Services, Inc.
BetaWEST Properties, Inc.

TABLE OF CONTENTS

RULE 29.1 STATEMENT i

TABLE OF AUTHORITIES iv

INTRODUCTION 1

STATEMENT OF THE CASE 2

A. The Origins of the Information Services Restriction . . 2

B. The Triennial Review 4

C. The First Appeal and Petition for Certiorari 6

D. The Remand to the District Court 7

E. Petitioners' Application for Stay 9

F. The Second Appeal 9

REASONS FOR DENYING THE WRIT 10

I. THE DECISION BELOW IS FULLY CONSISTENT WITH LONGSTANDING JUDICIAL PRECEDENT 11

II. THE DECISION BELOW IS FULLY CONSISTENT WITH THE TUNNEY ACT 20

III. THERE IS NO REASON TO REVIEW THE COURT OF APPEALS' 1990 INTERPRETATION OF THE AT&T DECREE 24

CONCLUSION 28

TABLE OF AUTHORITIES

Cases: **Pages**

American Newspaper Publishers Ass'n v. United States, 112 S. Ct. 366 (1991) 9
AMF, Inc. v. Jewett, 711 F.2d 1096 (1st Cir. 1983) 26
Baltimore Gas & Elec. Co. v. NRDC, 462 U.S. 87 (1983) 18
Board of Educ. v. Dowell, 498 U.S. 237 (1991) 15
Brown Shoe Co. v. United States, 370 U.S. 294 (1962) . . 16
Brown v. Neeb, 644 F.2d 551 (6th Cir. 1981) 26
Buckeye Coal & Ry. Co. v. Hocking Valley Ry. Co., 269 U.S. 42 (1925) 12
Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 1
City of New York v. Exxon Corp., 697 F. Supp. 677 (S.D.N.Y. 1988) 14
FCC v. National Citizens Committee for Broadcasting, 436 U.S. 775 (1978) 18
Ferrell v. Pierce, 743 F.2d 454 (7th Cir. 1984) 26
Freeman v. Pitts, 112 S. Ct. 1430 (1992) 15
Heckler v. Chaney, 470 U.S. 821, 831 (1985) 19
In re Acushnet River & New Bedford Harbor, 712 F. Supp. 1019 (D. Mass. 1989) 14
Jeff D. v. Andrus, 899 F.2d 753 (9th Cir. 1989) 26
Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co., 463 U.S. 29 (1983) 17
O'Neill v. United States, 411 F.2d 139 (3d Cir. 1969) . . 19
People of State of California v. FCC, 905 F.2d 1217 (9th Cir. 1990) 17
Rufo v. Inmates of Suffolk County Jail, 112 S. Ct. 748 (1992) 15
Sam Fox Publishing Co. v. United States, 366 U.S. 683 (1961) 12, 21
South v. Rowe, 759 F.2d 610 (7th Cir. 1985) 26

TABLE OF AUTHORITIES (cont.)

Cases: **Pages**

Stotts v. Memphis Fire Dept.,
858 F.2d 289 (6th Cir. 1988) 26
Swift & Co. v. United States, 276 U.S. 311 (1928) . 12, 21
United States v. Alcan Aluminum, Ltd.,
605 F. Supp. 619 (W.D. Ky. 1985) 22
United States v. American Cyanamid Co.,
719 F.2d 558 (2d Cir. 1983),
cert. denied, 465 U.S. 1101 (1984) . . . . . *passim*
United States v. Associated Milk Producers, Inc.,
394 F. Supp. 29 (W.D. Mo. 1975) 22
United States v. Atlantic Refining Co.,
360 U.S. 19 (1959) 25, 26
United States v. AT&T, 552 F. Supp. 131
(D.D.C. 1982), *aff'd mem. sub nom. Maryland*
v. United States, 460 U.S. 1001 (1983) . . . . . *passim*
United States v. Bechtel Corp., 648 F.2d 660
(9th Cir.), *cert. denied*, 454 U.S. 1083 (1981) 13
United States v. Cannons Engineering Corp.,
720 F. Supp. 1027 (D. Mass. 1989) 14
United States v. CIBA Corp.,
1970 Trade Cas. ¶ 73,319 (S.D.N.Y. 1970) 14
United States v. City of Northlake,
942 F.2d 1164 (7th Cir. 1991) 26
United States v. Columbia Artists Management, Inc.,
1987-1 Trade Cas. (CCH) ¶ 67,600 (S.D.N.Y. 1987) . 13
United States v. General Motors Corp.,
1983-2 Trade Cas. (CCH) ¶ 65,614 (N.D. Ill. 1983) . . 13
United States v. Gillette Co.,
406 F. Supp. 713 (D. Mass. 1975). 22
United States v. G. Heileman Brewing Co.,
563 F. Supp. 642 (D. Del. 1983) 22
United States v. Hooker Chemical & Plastics Corp.,
540 F. Supp. 1067 (W.D.N.Y. 1982) 14

TABLE OF AUTHORITIES (cont.)

Cases: **Pages**

United States v. Louisiana-Pacific Corp., 1990-1 Trade Cas. (CCH) ¶ 69,077 (D. Oregon 1990) 14
United States v. Jas. H. Matthews & Co., 1989 Trade Cas. (CCH) ¶ 68,441 (W.D. Pa. 1989) 16
United States v. Mid-America Dairymen, Inc., 1977-1 Trade Cas. (CCH) ¶ 61,508 (W.D. Mo. 1977) 13, 21
United States v. Motor Vehicles Manufacturers Ass'n, 1981-2 Trade Cas. (CCH) ¶ 64,370 (C.D. Cal. 1981) 20
United States v. National Broadcasting Co., Inc., 449 F. Supp. 1127 (C.D. Cal. 1978) 22
United States v. National Finance Adjusters, Inc., 1985-2 Trade Cas. (CCH) ¶ 66,856 (E.D. Mich. 1985) 13
United States v. Pollard, 959 F.2d 1011 (D.C. Cir. 1992) 27
United States v. Stroh Brewery Co., 1982-2 Trade Cas. (CCH) ¶ 64,804 (D.D.C. 1982) . . . 22
United States v. Western Electric Co., 894 F.2d 430 (D.C. Cir. 1990) 16
United States v. Western Electric Co., 900 F.2d 283 (D.C. Cir.) (*per curiam*) ("*Triennial Review Opinion*"), *cert. denied*, 498 U.S. 911 (1990) . . . passim
United States v. Western Electric Co., 907 F.2d 1205 (D.C. Cir. 1990) 27
United States v. Western Electric Co., 969 F.2d 1231 (D.C. Cir. 1992), *cert. denied*, 113 S. Ct. 1363 (1993) 27
United States v. Western Electric Co., 993 F.2d 1572 (D.C. Cir. 1993) . . . . . *passim*
United States v. Western Electric Co., 569 F. Supp. 900 (D.D.C. 1983) 27

TABLE OF AUTHORITIES (cont.)

Cases: **Pages**

United States v. Western Electric Co., 578 F. Supp. 658 (D.D.C. 1983) 27
United States v. Western Electric Co., 592 F. Supp. 846 (D.D.C. 1984), *appeal dismissed*, 777 F.2d 23 (D.C. Cir. 1985) 27
United States v. Western Electric Co., 673 F. Supp. 525 (D.D.C. 1987) 5
United States v. Western Electric Co., 767 F. Supp. 308 (D.D.C. 1991) 8, 19
United States v. Western Electric Co., 1991-92 Trade Cas. (CCH) ¶ 69,610 (D.C. Cir. Oct. 7, 1991) (*per curiam*) 9
United States v. Yoder Brothers, Inc., 1989-2 Trade Cas. (CCH) ¶ 68,723 (N.D. Ohio 1989) 13
Wayte v. United States, 470 U.S. 598, 607 (1985) 19

Statutes and Legislative Materials:

119 Cong. Rec. 24598 (1973) 22, 23
120 Cong. Rec. 36342 (1974) 23
H.R. Rep. No. 1463, 93d Cong., 2d Sess. 11 (1974) . . . 23
S. Rep. No. 298, 93d Cong., 1st Sess. 3 (1973) 23
Tunney Act, 15 U.S.C. § 16(b)-(h) . . . . . *passim*

Miscellaneous:

2 P. Areeda & D. Turner, *Antitrust Law* ¶ 300g (1978) . 14
2 M. Handler, *Twenty-Five Years of Antitrust* (1973) . . . 17
Dr. Peter Huber, *The Geodesic Network: 1987 Report on Competition in The Telephone Market* 5
Note, *Judicial Review of Antitrust Consent Decrees: Reconciling Judicial Responsibility With Executive Discretion*, 35 Hastings L.J. 133 (1983) 21
Note, *Modifications of Antitrust Consent Decrees*, 84 Mich. L. Rev. 134, 144 (1985) 14

INTRODUCTION

This case involves a fact-specific application of the settled legal standard for a consent decree modification that is unopposed by any party to the decree. Originally, federal courts developed this standard as a matter of federal common law; it was then incorporated by Congress in the Tunney Act, 15 U.S.C. § 16(b)-(h). The Court of Appeals' decision below applying this standard is entirely consistent with long-settled precedent, there is no conflict among the circuits, and there is no reason for this Court to grant the petition for a writ of certiorari.

The real question in this case is a matter not of law but of telecommunications policy: whether the Bell Operating Companies, made independent by the 1982 AT&T consent decree, will be permitted to enter the "information services" market (composed of such services as LEXIS, Prodigy, and so on), or whether industry incumbents — many of whom are petitioners here — will succeed in restricting competition to the detriment of consumers nationwide. The Department of Justice, together with other federal agencies, has carefully studied the matter and has decided in favor of telephone company entry and greater competition. Petitioners urge this Court to consider the "practical importance" of this case in deciding whether to grant certiorari. Petition for a Writ of Certiorari ("Pet.") 11. Yet it is precisely the importance of the issue, the intensely factual nature of the policy debate, and the dynamic character of the telecommunications industry that militate against, rather in favor of, the grant of certiorari. As this Court has observed, "federal judges — who have no constituency — have a duty to respect legitimate policy choices made by those who do." *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 866 (1984).

Not surprisingly, petitioners have attempted to transmute this policy debate into a legal one. But they can do so only by resorting to hyperbole and gross distortion of the opinion below. Petitioners claim that the decision below "strips" federal district courts of their proper role in deciding whether to approve a decree modification, by holding that a district

court "is not permitted to make an independent judicial determination of the competitive impact of a proposed modification to an antitrust consent decree." Pet. 2-3.

This is simply untrue. The Court of Appeals below expressly *rejected* the notion that a district court must show "abject deference" to the Department of Justice's analysis of a proposed modification's competitive impact, or that a district court must engage in "total, rubber-stamp deference." *United States v. Western Electric Co.*, 993 F.2d 1572, 1576, 1577 (D.C. Cir. 1993); Pet. App. 11a, 13a-14a. The Court of Appeals explained that it did not intend any "more deference than is conventional between court and agency on expert, predictive judgments." 993 F.2d at 1577; Pet. App. 13a. The crux of the court's holding was simply that it is "not up to [a district] court to reject an agreed-on change simply because the proposal diverged from *its* view of the public interest." *Id.* at 1576 (emphasis in original); Pet. App. 10a. This is the sort of routine application of settled legal principles that should not trigger this Court's review.

STATEMENT OF THE CASE

A. The Origins of the Information Services Restriction

This case concerns the removal of an obsolete provision of the 1982 AT&T consent decree prohibiting the Bell Operating Companies from providing "information services," defined as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information which may conveyed via telecommunications."[1] This decree, sometimes called the "MFJ," was entered after the parties consented to a review by the district court to determine whether the decree was "within the reaches

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[1] *United States v. AT&T*, 552 F. Supp. 131, 229 (D.D.C. 1982), *aff'd mem. sub nom. Maryland v. United States*, 460 U.S. 1001 (1983).

of [the] public interest." *United States v. AT&T*, 552 F. Supp. 131, 145, 151 (D.D.C. 1982) (Greene, J.), *aff'd mem. sub nom. Maryland v. United States*, 460 U.S. 1001 (1983).

The Government's antitrust case against AT&T had centered exclusively on AT&T's activities in the interexchange service and equipment manufacturing markets. There were no allegations, or evidence presented, of antitrust violations in the information services market. Indeed, "there really was no record to speak of concerning AT&T's activities in the information services market." *United States v. Western Electric Co.*, 900 F.2d 283, 307 (D.C. Cir.) (*per curiam*) ("*Triennial Review Opinion*"), *cert. denied*, 498 U.S. 911 (1990); Pet. App. 118a. "The parties agreed to the information services restriction as a precautionary measure in light of uncertainty about how divestiture of AT&T would affect development of this embryonic market." *Id.* Accordingly, the D.C. Circuit has already held, in a case in which this Court denied review, that the information services restriction was not required to be in the decree in the first place. *See id.*

Thus, while the district court carefully noted in 1982 that there were no findings or admissions of antitrust violations even with respect to the interexchange service and equipment manufacturing claims that were the centerpiece of the Government's case,[2] the absence of any documented need for the information services restriction is all the more striking. It has *never* played the traditional role of a provision in a consent

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[2] The district court noted: "It would be inappropriate for the Court at this juncture to draw definitive conclusions with regard either to the sufficiency of the evidence to sustain a finding of liability or to the validity of AT&T's various legal and factual defenses. The Court is not called upon, in this public interest proceeding, to render a final judgment on this case; indeed, not all the evidence that may bear on the issues has yet been adduced." 552 F. Supp. at 161. Accordingly, the decree specifically provided that none of its terms or provisions shall "constitute any evidence against, an admission by, or an estoppel against any party or BOC." MFJ § III, 552 F. Supp. at 211.

decree — to remedy or prevent a violation of the law apparent from the record of a case.

B. The Triennial Review

When the decree was negotiated, both the Department and the district court recognized that the need for line-of-business limits on the Bell Companies, including the information services restriction, "will disappear" and that, in time, "their sole effect would be to limit competition by preventing the entry of a viable competitor." 552 F. Supp. at 194-95 & n.264. Accordingly, the Department pledged to make triennial reports on the continuing need for these restrictions, with the view of eliminating them "at the earliest possible date" when competitive conditions warranted. Brief of the United States in Response to the Court's Memorandum of May 25, 1982, in *United States v. Western Electric Co.*, No. 82-0192 (D.D.C.), at 31.

By the first such review in 1987, it was plain that the purely prophylactic information services restriction was proving counterproductive in practice. The Department of Justice issued a comprehensive report explaining that, "while it was assumed at the time the decree was entered that a general prohibition on BOC provision of information services would not deprive the public of access to various types of information services of significant efficiencies, this assumption has been disproved by subsequent developments." Report and Recommendations of the United States, filed Feb. 2, 1987, at 152-53. The Department added that "[c]onsumers have been deprived of some services already, and the potential that efficiency will be sacrificed or that services made possible by new technical developments will be unavailable to BOC customers is likely to be even greater in the future." *Id.*

The Department also explained that the risks of anticompetitive conduct by the Bell Companies were slight. "In the five years since the decree was entered, the relationship between information services and the local exchange has diverged in

important respects from the traditional bottleneck relationship anticipated at the time the decree was entered." *Id.* at 126-27. DOJ noted the large size of many competitors and the increasing globalization of the information services market and concluded that there was no realistic prospect that the Bell Companies would obtain market power if allowed to enter the information services market. *Id.* at 112-13, 122. DOJ determined that various regulatory protections "should mitigate, even if they do not completely eliminate," the risks of anticompetitive behavior. *Id.* at 133.[3]

Accordingly, in 1987 the Department, joined by the Bell Companies, moved the district court to eliminate the information services ban from the decree. This motion was unopposed by any party to the decree, so that the parties' consent that had provided the sole basis for the information services ban had disappeared. Nonetheless, the district court did not apply the common-law "public interest" test of Section VII of the decree — a test which the district court had itself applied to the original decree in 1982, and which the parties had explicitly agreed would govern future consensual modifications. *See Triennial Review Opinion*, 900 F.2d at 305-07; Pet. App. 113a-117a. Instead, the district court held that circumstances had not changed sufficiently to warrant relief under Section VIII(C) of the decree, which requires a petitioning Bell Company to show that "there is no substantial possibility that it could use its monopoly power to impede competition in the market it seeks to enter." *United States v.*

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[3] In reaching these conclusions, the Department relied in part on an exhaustive report by Dr. Peter Huber, *The Geodesic Network: 1987 Report on Competition in The Telephone Market*, which documented that opportunities for anticompetitive conduct by Bell Companies were "slight" because of economic, technical, and regulatory constraints, *id.* at 3.37, 6.18 to 6.20, 6.23, 6.30 to 6.32, 6.35, 6.39, and that the entry of powerful firms — like American Express, Dow Jones, and Time, Inc. — into the information services market meant that "[i]t is not likely" that a Bell Company "will be able to leverage its one-region network to impede competition on that kind of scale." *Id.* at 6.51.

Western Electric Co., 673 F. Supp. 525, 532-35, 567 (D.D.C. 1987).

C. The First Appeal and Petition for Certiorari

On appeal, the D.C. Circuit rejected the use of the Section VIII(C) test for uncontested motions to modify the decree. Looking to the history and language of the decree, the court found that there was "little question that the parties expected uncontested motions to be governed by" the more permissive public interest test of Section VII. *Triennial Review Opinion*, 900 F.2d at 306; Pet. App. 115a. The court therefore held that, when all the parties to a decree assent to a particular modification, the Section VII public interest test "directs the district court to approve an uncontested modification so long as the resulting array of rights and obligations is within the *zone of settlements* consonant with the public interest *today*." *Id.* at 307 (citation omitted; emphasis in original); Pet. App. 117a.

Essentially the same group of petitioners as those before this Court today then brought a petition for certiorari, raising many of the same arguments, albeit in slightly different form, that are contained in the instant petition. In 1990, the petitioners complained not only that the *Triennial Review Opinion* had applied Section VII of the decree rather than Section VIII(C), but also that the decision erred in interpreting the district court's role under Section VII as a limited one. The D.C. Circuit's 1990 ruling, according to petitioners, was a "virtual directive to Judge Greene to let the regional Bells enter the information services market." Petition for Certiorari in No. 90-9, at 16. Petitioners argued that the Court of Appeals had improperly established a "flexible test," *id.* at 25, and contended that it should instead have followed the supposedly more stringent approach of *United States v. American Cyanamid Co.*, 719 F.2d 558 (2d Cir. 1983), *cert. denied*, 465 U.S. 1101 (1984), which petitioners maintained was an "indistinguishable" case. Petition for Certiorari in No. 90-9, at 18 & n.30. This Court denied certiorari without comment or dissent. 498 U.S. 911 (1990).

D. The Remand to the District Court

On remand before the district court, DOJ updated the extensive "experience and the information it ha[d] obtained in the course of administering and enforcing the decree," considered various newly available studies of information services markets, reviewed current regulatory developments, and held numerous meetings with interested persons. Memorandum of the United States, in *United States v. Western Electric Co.*, No. 82-0192 (D.D.C.), filed Aug. 22, 1990, at 9. The Department concluded that: (1) significant competitive benefits can be expected from new entry by seven firms representing two-thirds of the telecommunications industry (*id.* at 35-41); (2) the Bell Companies have now engaged in related lines of business (such as customer premises equipment (CPE)), and other regulated telecommunications carriers — including GTE and independent and foreign telephone companies — have now provided information services for many years; yet none of these firms has obtained market power (*id.* at 15, 25 n.32, 34-35, 39-40); (3) substantial market constraints will prevent the Bell Companies from lowering output or raising price in information services (*id.* at 27-35); (4) major practical impediments will prevent any acquisition of market power through covert discrimination against competitors or cross-subsidization of information services (*id.* at 16-21); and (5) regulatory constraints will deter any Bell Company from launching a campaign to lower output or raise price through illegal practices (*id.* at 22-27). The Department also determined that administering the information services restriction consumed finite enforcement resources that could be better deployed in other ways. Reply of the United States, in *United States v. Western Electric Co.*, No. 82-0192 (D.D.C.), filed Jan. 18, 1991, at 29-31.

The Department's policy judgment was powerfully supported by the Federal Communications Commission (FCC); by the National Telecommunications and Information Administration (NTIA) of the Department of Commerce; by such notable economists as Professors Jerry Hausman and

Franklin Fisher, both of MIT, and Nobel laureates Kenneth Arrow and George Stigler; by Alfred Kahn, the nation's premier expert on regulated markets; by the National Association of Regulatory Commissioners (NARUC) and numerous state commissions, including those of California, Florida, Illinois, Michigan, Pennsylvania, Vermont, Virginia, West Virginia, and Wisconsin; and by a wide array of public interest and consumer groups.[4]

Faced with this overwhelming showing, the district court granted the motion to lift the information services restriction. *United States v. Western Electric Co.*, 767 F. Supp. 308, 327 (D.D.C. 1991); Pet. App. 62a-63a. The district court understood that it was required "to decide only whether the settlement is within the reaches of the public interest." *Id.* at 329 n.101; Pet. App. 66a n.101. Although Judge Greene discoursed at some length, *id.* at 312-27; Pet. App. 29a-62a, on why he personally disagreed with DOJ's policy judgment and why he would not favor Bell Company entry into information services, he concluded that he could not deny relief under the applicable legal standard. Nonetheless, he *sua sponte* stayed his decision pending appeal. 767 F. Supp. at 332-33; Pet. App. 73a-75a.

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[4] This coalition included: Action for Children's Television; American Council for the Blind; Black Citizens for a Fair Media and the Council of Churches of the City of New York; Church Federation of Greater Chicago, Office of Communications; Citizens for a Sound Economy Foundation; Consumer Interest Research Institute; Consumer Research Foundation; Council of Chief State School Officers; the Media Institute; National Association for Better Broadcasting; National Association for the Advancement of Colored People; National Association of the Deaf; National Association of Silver Haired Legislators; National Indian Youth Council, Inc., and the Native American Broadcasting Consortium; National School Boards Association; National School Public Relations Association; Northeast Independent Living Program; Public Service Satellite Consortium; Telecommunications for the Deaf, Inc.; and World Institute on Disability, Inc.

E. Petitioners' Application for Stay

On motion of the United States and the Bell Companies, the Court of Appeals vacated the district court's stay as an "abuse of discretion" and held that none of the requirements for stay could be met. *United States v. Western Electric Co.*, 1991-92 Trade Cas. (CCH) ¶ 69,610, at 66,711 (D.C. Cir. Oct. 7, 1991) (*per curiam*).

Petitioners then sought a new stay in this Court on many of the same grounds as they now raise in their instant petition. In their stay application, they argued that the D.C. Circuit decision was in "square conflict" with the Second Circuit's decision in *American Cyanamid*. Application for Stay in A-91-267, at 21 (Oct. 15, 1991). As in their current petition, they insisted that this Court's intervention was "especially warranted" because the decree provision at issue "is a boilerplate provision the Department routinely includes in *every* antitrust decree." *Id.* at 16 (emphasis in original). They complained of confusion in the lower courts, referring to the same cases that they cite in their current petition. *Id.* at 23-24. The application for stay was referred to the entire Court and was unanimously denied. *American Newspaper Publishers Ass'n v. United States*, 112 S. Ct. 366 (1991).

Thus, since October of 1991, the Bell Companies have been competing vigorously in the information services market. Yet there is no evidence of any anticompetitive effects from this real-world experience.

F. The Second Appeal

On appeal of the merits, the D.C. Circuit unanimously affirmed the district court's judgment lifting the information services restriction. 993 F.2d 1572; Pet. App. 1a. Citing extensively to the leading cases regarding unopposed modifications, the Court of Appeals stressed that the deference due to the Department's policy judgment was not "abject" or "rubber-stamp," *id.* at 1576-77; Pet. App. 11a, 13a; in fact, the court explained that it was no greater than the "conventional"

deference to which agencies are entitled with respect to "expert, predictive judgments." *Id.* at 1577; Pet. App. 13a. The court added that this approach "accord[ed] with other courts' understanding of the court-agency relation under the Tunney Act." *Id.* at 1576; Pet. App. 12a.

In view of the fact-specific nature of the dispute in this case, the Court of Appeals spent twice as many pages analyzing the record evidence supporting the modification of the consent decree as it did discussing the appropriate legal test. The court determined that there was "an ample factual foundation for the judgment call made by the Department" and that any other conclusion would be "clearly erroneous." 993 F.2d at 1582; Pet. App. 23a. The Court of Appeals upheld the Department's determinations (1) that "there was no substantial risk that removal of the [information services] ban would lessen competition"; (2) "that under current conditions regulation would play a substantial role minimizing any anticompetitive risks"; and (3) "that removal of the ban would benefit consumers by enhancing competition in information services." *Id.* at 1578; Pet. App. 14a-15a. Indeed, the court determined that the factual showing supporting the Department's policy judgment was so overwhelming that it was unnecessary to define precisely what level of deference the district court had in fact applied. *Id.*; Pet. App. 14a.

Petitioners, primarily incumbents trying to foreclose new competition in the information services industry, did not seek rehearing in the D.C. Circuit. Instead, they directly petitioned this Court for review.

REASONS FOR DENYING THE WRIT

This case began in 1987. This is the third occasion on which petitioners have presented to this Court essentially the same arguments, in slightly different guises. This Court has already denied, unanimously and without comment, the 1990 petition seeking review of the *Triennial Review Opinion*; it has

already denied, unanimously and without comment, the 1991 stay application. As a result, the Bell Companies have been permitted to enter the information services market, investments have been made, and fundamental changes in the industry have occurred.

There is no reason for reversing course at this late date. The instant petition should receive the same disposition as the two prior proceedings before this Court, so that this case might finally come to an end.

I. THE DECISION BELOW IS FULLY CONSISTENT WITH LONGSTANDING JUDICIAL PRECEDENT

The Court of Appeals below erected no exceptional rule of deference to the policy judgment of the Department of Justice. Quite the contrary: the court explicitly disavowed any suggestion that a district court should manifest "abject deference" to the Department, or that a court should exhibit "total, rubber-stamp deference." 993 F.2d at 1576, 1577; Pet. App. 11a, 13a-14a. The Court of Appeals explained that it did not intend any "more deference than is conventional between court and agency on expert, predictive judgments." *Id.* at 1577; Pet. App. 13a. This statement of the law is correct, entirely unremarkable, and in fact consistent with the position taken by petitioners in this very case.[5]

Petitioners attempt to manufacture a certworthy question by caricaturing the court's holding[6] and by recycling their com-

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[5] Before the Court of Appeals, petitioners conceded that a reviewing court is required to give "special weight" to DOJ's views. Appellants' Brief 29 n.38. Before this Court, petitioners have previously acknowledged that "courts should give some deference" — even "great deference" — "to the views of the Department of Justice." Reply to Oppositions to Application for Stay in A-91-267, at 10 & n.17 (Oct. 24, 1991).

[6] The Court of Appeals criticized petitioners for trying to distort the meaning of its previous *Triennial Review Opinion* through

plaint, already twice rejected by this Court, of "confusion" and "conflict" in the lower courts regarding whether the Department of Justice's policy judgment is to be accorded deference in uncontested consent decree modifications. Pet. 20. The attempt at caricature is transparent, and the claim of "conflict" is no more persuasive the third time around.

There is no confusion or conflict in the lower courts. There is only an unbroken line of cases stemming from this Court's teaching that the Justice Department "must alone speak for the public interest" in antitrust matters. *See Buckeye Coal & Ry. Co. v. Hocking Valley Ry. Co.*, 269 U.S. 42, 48-49 (1925); *see also Swift & Co. v. United States*, 276 U.S. 311, 331-32 (1928) (the Attorney General's "authority to make determinations includes the power to make erroneous decisions as well as correct ones"); *Sam Fox Publishing Co. v. United States*, 366 U.S. 683, 689 (1961) (it would be improper "to assess the wisdom of the Government's judgment in negotiating and accepting [a] consent decree, at least in the absence of any claim of bad faith or malfeasance on the part of the Government in so acting").

Consistent with these precedents, all lower courts to consider the question have ruled that the Department's policy judgment is entitled to deference in deciding whether a proposed modification is within the public interest. For example, in a leading case that the Court of Appeals noted both in the decision below, *see* 993 F.2d at 1576; Pet. App. 12a, and in the earlier *Triennial Review Opinion*, *see* 900 F.2d at 306, 307, 309; Pet. App. 114a-115a, 117a, 118a, 121a, the Ninth Circuit explained that "[w]e cannot agree that a district court should engage in an unrestricted evaluation of what relief would best serve the public. The balancing of competing social and political interests affected by a proposed antitrust decree

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"selective[]" quotation, 993 F.2d at 1576; Pet. App. 11a; ironically, petitioners now attempt the same strategy of distortion with respect to the very opinion that exposes their tactic.

must be left, in the first instance, to the discretion of the Attorney General." *United States v. Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir.) (emphasis added), *cert. denied*, 454 U.S. 1083 (1981). The Ninth Circuit added that a "court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is "within the reaches of the public interest." *Id.* (quoting *United States v. Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975)).[7] As Professor Areeda

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[7] *See also, e.g., United States v. Yoder Brothers, Inc.*, 1989-2 Trade Cas. (CCH) ¶ 68,723, at 61,795 & n.5 (N.D. Ohio 1989) (applying proper "deference to the Justice Department's public interest determination" and explaining that a court "'may not substitute its opinion concerning . . . the determination of appropriate injunctive relief . . . absent proof of an abuse of discretion'") (citation omitted); *United States v. Columbia Artists Management, Inc.*, 1987-1 Trade Cas. (CCH) ¶ 67,600, at 60,601 (S.D.N.Y. 1987) (approving termination of consent decree because "the Department of Justice has offered a reasonable and persuasive explanation of why the termination of the judgment would serve the public interest in free and unfettered competition"); *United States v. National Finance Adjusters, Inc.*, 1985-2 Trade Cas. (CCH) ¶ 66,856, at 64,248 (E.D. Mich. 1985) ("the Justice Department has wide discretion in controlling government antitrust litigation, and this court should not second guess the wisdom of its acceptance of a consent decree or a modification thereof unless there is a claim of bad faith or malfeasance on the part of the government in so acting. . . . The court cannot say that the proposed modification is not in the public interest. . . . The Justice Department has made a reasoned determination that [modification of the decree would promote competition]. Since this determination has some support in economic theory and in the facts of this case, the court cannot say that the government has abused its discretion in deciding to [modify the decree.]"); *United States v. General Motors Corp.*, 1983-2 Trade Cas. (CCH) ¶ 65,614, at 69,093 (N.D. Ill. 1983) (according weight to the Government's views because "the Justice Department . . . continues to represent the people of the United States and can be trusted to at least in good faith, whether correctly or not, assert what it believes the public interest to be"); *United States v. Mid-America Dairymen, Inc.*, 1977-1 Trade Cas. (CCH) ¶ 61,508, at 71,980 (W.D.

has recognized, the public interest analysis that courts typically perform is quite limited and "even those courts exercising greater scrutiny stop far short of attempting to assess the competitive merits of one form of relief or another."[8]

In addition, the standard applied by the Court of Appeals is fully consistent with the common law test for unopposed modifications[9] and with the approaches of courts reviewing consent decrees in other contexts, such as environmental law.[10] The standard is also consistent with this Court's recent

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Mo. 1977) ("Absent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should . . . carefully consider the explanations of the government . . . and its responses to comments in order to determine whether those explanations are reasonable under the circumstances."); *United States v. Louisiana-Pacific Corp.*, 1990-1 Trade Cas. (CCH) ¶ 69,077, at 63,945 (D. Oregon 1990) (reviewing FTC refusal to modify consent decree under arbitrary and capricious standard).

[8] 2 P. Areeda & D. Turner, *Antitrust Law* ¶ 300g, at 145 (1978); *see also* Note, *Modifications of Antitrust Consent Decrees*, 84 Mich. L. Rev. 134, 144 (1985) ("The standard is extremely deferential to the Justice Department's determination of the public interest. . . . The cases do not . . . reflect an intense inquiry into the public interest").

[9] *E.g., United States v. CIBA Corp.*, 1970 Trade Cas. ¶ 73,319, at 89,262 (S.D.N.Y. 1970).

[10] Courts have stressed that the judicial function "is not to substitute [the court's] own judgment for that of the parties to the decree" and that courts have "only limited powers of review." *United States v. Hooker Chemical & Plastics Corp.*, 540 F. Supp. 1067, 1072 (W D.N.Y. 1982); *see also United States v. Cannons Engineering Corp.*, 720 F. Supp. 1027, 1036 (D. Mass. 1989) ("there is a presumption in favor of the settlement, particularly where 'a government agency committed to the protection of the public interest has participated in and endorsed the settlement'") (citations omitted); *In re Acushnet River & New Bedford Harbor*, 712 F. Supp. 1019, 1028 (D. Mass. 1989) ("the trial court 'should accord some substantial deference to [an] agency's determination that [a] settlement is appropriate'") (citation omitted); *City of New York v. Exxon Corp.*, 697 F. Supp. 677, 692 (S.D.N.Y. 1988) ("the court does not 'have the right or the duty to reach any ultimate conclusions on the issues of fact and law which

decisions emphasizing the need to afford the Government flexibility in securing decree modifications, even when the modification is sought by the restricted party over the original plaintiff's objection and even when the defendant proposing the modification has been found to have committed constitutional violations. *See Rufo v. Inmates of Suffolk County Jail*, 112 S. Ct. 748, 758, 760 (1992); *Board of Educ. v. Dowell*, 498 U.S. 237, 246-51 (1991). The situation here presents a far more compelling case for flexibility: no party to the decree opposes its modification, which is resisted primarily by industry incumbents representing their own parochial interests rather than the public interest, and the provision in question was never necessary to redress a violation of law, but was included in the decree only out of an excess of caution.[11]

Against this overwhelming authority, petitioners claim to have found a circuit conflict in the form of a single, supposedly inconsistent Second Circuit decision, *United States v. American Cyanamid Co.*, 719 F.2d 558 (2d Cir. 1983), *cert. denied*, 465 U.S. 1101 (1984). That case was the centerpiece of both the unsuccessful prior petition for certiorari and the rejected stay application. *Cyanamid* is entirely consistent with the decision below, for there the Second Circuit held merely that a district court erred when it failed to apply a specific test (different from the public interest standard) that the parties had expressly agreed would govern the removal of a decree restriction. 719 F.2d at 565. Certainly, *Cyanamid* has not been interpreted to stand for the proposition that the Department's views are

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underlie the merits of the dispute'") (citation omitted).

[11] The information services restriction rested only on the parties' consent, now evaporated, and hence lacks the traditional foundation of a judicial remedial decree. *See Freeman v. Pitts*, 112 S. Ct. 1430, 1445 (1992) ("[i]n construing the remedial authority of the district courts, we have been guided by the principles that judicial powers may be exercised only on the basis of a [legal] violation, and that the nature of the violation determines the scope of the remedy") (internal quotation marks omitted).

entitled to no deference under the public interest standard. *E.g., United States v. Western Electric Co.*, 894 F.2d 430, 434 (D.C. Cir. 1990). Beyond this, the Second Circuit did not reject a policy judgment by DOJ but rather the Department's attempt to disavow *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962), as the authoritative interpretation of the Clayton Act for vertical mergers. *See* 719 F.2d at 567. It is one thing to say, as the *Cyanamid* court did, that DOJ is bound to follow Supreme Court precedent; it is quite another to claim, as petitioners do, that the Department's inherently predictive and multi-factored balancing judgment in this case is entitled to no deference at all.[12]

Petitioners attempt to manufacture a question for this Court's review by asserting that this settled law "strips" district courts of their proper judicial authority. Nothing could be further from the truth. Under longstanding precedent regarding uncontested modifications, district courts retain an important factfinding role to ensure that the Government's views are rational, adequately explained, and not the product of malfeasance.[13] The Court of Appeals' exhaustive review of

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[12] Petitioners also claim to have found a conflict in *United States v. Jas. H. Matthews & Co.*, 1989 Trade Cas. (CCH) ¶ 68,441 (W.D. Pa. 1989), but that case conflicts only with petitioners' cartoon version of the Court of Appeals' decision. The *Matthews* court, "cognizant of the quasi-judicial nature of consent decrees and the 'occasional fallibility of the government,'" (quoting *United States v. Swift & Co.*, 1975-1 Trade Cas. (CCH) ¶ 60,201, at 65,703 (N.D. Ill. 1975), declared that it would not "rubberstamp the government's proposed termination." *Id.* at 60,434. Neither would the D.C. Circuit below. *See* 993 F.2d at 1577; Pet. App. 13a. Both courts made "the determination whether termination is in the public's interest," while "giv[ing] the government's position a degree of deference." *Matthews*, 1989 Trade Cas. at 60,434.

[13] As leading antitrust theorist Professor Milton Handler of Columbia University has explained: "To avoid being a rubber stamp, it is not necessary to conduct a hearing into the merits of the government's case, the soundness of the defenses, and the appropriateness of the judgment. There is a middle ground. The court is well-equipped

the facts of this case, *see* 993 F.2d at 1578-82; Pet. App. 14a-23a, demonstrates that the judicial role is hardly a supine one, and the court's analogy (*id.* at 1577; Pet. App. 12a) to the "arbitrary and capricious" test of administrative law — which, obviously, has often been used to overturn agency decisions, *e.g.*, *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43 (1983); *People of State of California v. FCC*, 905 F.2d 1217, 1238-39 (9th Cir. 1990) — shows that the test is not toothless. The Court of Appeals had in mind no "more deference than is conventional" for agencies to receive "on expert, predictive judgments." 993 F.2d at 1577; Pet. App. 13a. To say that a court's factfinding must be exercised with due regard for the expertise of the political branches is not to deny the court its proper function.

Indeed, in this case the parties to the decree recognized in 1982 that the information services restriction had anti-competitive potential and that it would be necessary to lift the restriction when DOJ determined it was appropriate to do so. A court reviewing an unopposed modification is asked not to decide a routine factual question but to assess whether the modified decree is in the "public interest" — a task which in the antitrust field involves making multi-faceted policy judgments based on market analysis, administrative experience,

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to probe with dispatch claims of bad faith, collusion, or malfeasance on the part of the Department; [and] to determine whether the decree requires the performance of illegal acts or gives shelter to unlawful conduct. . . . The court is entitled to inquire of the government whether any objections have been filed with the Department, what disposition has been made of them and to inform itself of the nature and scope of such objections. And, of course, it is entitled to a full statement by the parties of the background and purposes of the litigation and an explanation of the objects and provisions of the judgment. Once satisfied of the parties' good faith, a court has, in my opinion, no alternative but to accept both the government's judgment as to what the public interest demands and the compromise that the parties have wrought through their negotiations." 2 M. Handler, *Twenty-Five Years of Antitrust* 883-84 (1973) (footnotes omitted).

enforcement priorities, economic policy, and a complex balancing of competitive risks and benefits. Even if the ultimate inquiry is whether the modified decree will, on balance, prove to be procompetitive, such a "predictive judgment," 993 F.2d at 1577; Pet. App. 12a, is not a simple question of fact or even an application of law to fact.

Thus, in *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978), this Court — in the course of upholding as "certainly not irrational" an FCC action taken pursuant to the "public interest" broadcasting test — explained that "to the extent that factual determinations were involved in the Commission's decision . . . they were primarily of a judgmental or predictive nature . . . . In such circumstances complete factual support in the record for the Commission's judgment or prediction is not possible or required; 'a forecast of the direction in which [the] future public interest lies necessarily involves deductions based on the expert knowledge of the agency.'" 436 U.S. at 813-14 (quoting *FPC v. Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 29 (1961)); *see also Baltimore Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 103 (1983).[14]

Moreover, not only is DOJ best equipped to weigh the procompetitive benefits of Bell Company entry into the information services market against the necessarily speculative risks of anticompetitive conduct, and not only is DOJ the most accountable entity to make the requisite policy judgments involved, but DOJ is also the only decisionmaker that can view this particular case from the perspective of the Federal Government's overall antitrust enforcement strategy and can take into account the

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[14] Petitioners note that the Department of Justice acts as a prosecutor rather than merely as an administrative agency when it proposes a modification to a consent decree. Pet. 15. But petitioners fail to grasp that this does not decrease the deference to which the Department is entitled. DOJ is, after all, acting as the direct representative of the President fulfilling his constitutional duty to "[t]ake Care that the Laws be faithfully executed." Art. II, § 3.

appropriate allocation of necessarily finite administrative resources. *See, e.g.*, *Heckler v. Chaney*, 470 U.S. 821, 831-32 (1985); *Wayte v. United States*, 470 U.S. 598, 607 (1985).[15]

Accordingly, there is no need for this Court to revisit the already settled law regarding unopposed modifications. And this case would be a most inappropriate vehicle in which to do so. First, the Court of Appeals found that the factual showing supported the Department's policy judgment so overwhelmingly that it was unnecessary for the appellate court to determine precisely what legal test the district court had applied. *See* 993 F.2d at 1578; Pet. App. 14a. Any clarification of the Court of Appeals' decision is similarly unlikely to alter the result in this case.[16] Second, the information services restriction was included in the MFJ only out of an excess of caution; it was never necessary to remedy or prevent a legal violation. It should thus arguably be subject to an even more relaxed standard than the traditional "public interest" test.

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[15] In *Maryland v. United States*, 460 U.S 1001 (1983), this Court affirmed the district court's entry of the AT&T consent decree. The majority's decision rested on a narrow issue presented by the motions for summary affirmance. But three Justices explained, in an argument that the majority did not need to reach, that permitting courts to "re-decide an executive decision" or "to decide whether the Department of Justice has exercised its prosecutorial discretion to settle antitrust cases as well as it should," *id.* at 1004 (Rehnquist, now C.J., dissenting), would vest in a court the type of discretionary policy judgment that is properly reposed in the politically accountable branches.

[16] The personal views of the district judge to which petitioners accord so much weight, Pet. 14 n.22, are not legally cognizable findings. The court issued them based on its "own judgment," 767 F. Supp. at 327; Pet. App. 62a, of what government policy should be, knowing that they would have no operative legal significance because the court was required, notwithstanding those "findings," to grant the relief DOJ sought. Such "findings" are "purely academic" and have no legal force. *O'Neill v. United States*, 411 F.2d 139, 146 (3d Cir. 1969).

II. THE DECISION BELOW IS FULLY CONSISTENT WITH THE TUNNEY ACT

The Court of Appeals, after canvassing relevant precedent, determined that its approach "accord[ed] with other courts' understanding of the court-agency relation under the Tunney Act." 993 F.2d at 1576; Pet. App. 12a. Petitioners disagree, and renew their argument that the Act requires a court to engage in *de novo* factfinding to determine for itself "whether a consent decree is procompetitive." Pet. 13. Yet the Act itself does not even apply to modifications of consent decrees; the Act says nothing about *de novo* review and has never been interpreted by *any* court to require such review; and petitioners present no reason to change the Act's well-settled interpretation, particularly in light of the concerns raised by three Justices of this Court in *Maryland v. United States*, 460 U.S. at 1001-04 (Rehnquist, now C.J., dissenting). *See* note 15, *supra*.

By its terms, the Tunney Act governs only the initial "entry" of consent decrees rather than their modification and thus does not directly apply to this case. 15 U.S.C. § 16(e)(2). The Court of Appeals explained that the parties had "assumed" the Act's applicability, 993 F.2d at 1576; Pet. App. 10a;[17] yet, the issue could not be avoided if the Act were used to overturn the court's judgment.[18]

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[17] In the court below, the Bell Companies did not waive the issue of the Act's applicability. *See* Brief of Bell Company Appellees at 53 (filed Sept. 28, 1992).

[18] The very precedent on which petitioners place heavy reliance makes plain that the Tunney Act does not apply to modifications of consent decrees. *See American Cyanamid*, 719 F.2d at 565 n.7. In fact, only one court has applied the Tunney Act to a proposal to modify a consent decree. *See United States v. Motor Vehicles Manufacturers Ass'n*, 1981-2 Trade Cas. (CCH) ¶ 64,370 (C.D. Cal. 1981) (stating tersely that "the provisions of the Act are applicable here" and providing no reasoning for its conclusion).

Furthermore, nothing in the Tunney Act indicates that it was intended to alter the deferential common-law approach to judicial review of the *substance* of the Department of Justice's policy judgment. To be sure, the Act creates a variety of *procedures* to ensure that third parties are made aware of proposed consent judgments and permitted to comment on them; that the Department prepares a competitive impact statement summarizing critical aspects of the proposed decree; and that the Department considers and responds to public comments. 15 U.S.C. § 16(b), (c), (d). But, although the Act provides that the court should "determine whether entry of the decree is in the public interest," *id.* at § 16(e), the Act does *not* say that the court, in making this determination, is to substitute its own policy judgment for the Department's. Had Congress meant to depart so dramatically from the settled common-law approach, it surely would have explicitly established such a standard of review.[19] Thus, as the Court of Appeals below noted, "in *United States v. Mid-America Dairymen, Inc.*, 1977-1 Trade Cas. (CCH) ¶ 61,508 (W.D. Mo. 1977), while the court spoke of making an 'independent public interest determination,' it also found that it was not 'to make a *de novo* determination of facts and issues,' and that its task was to determine whether the Department of Justice's explanations were 'reasonable under the circumstances.'" 993 F.2d at 1577 (citations omitted); Pet. App. 12a.

The decision below is also consistent with longstanding precedent construing the Tunney Act. In holding that the Act is satisfied so long as a proposed modification is within the "'reaches of the public interest,'" 993 F.2d at 1576; Pet. App.

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[19] *See* Note, *Judicial Review of Antitrust Consent Decrees: Reconciling Judicial Responsibility With Executive Discretion*, 35 Hastings L.J. 133, 151 n.143 (1983) ("[t]he Supreme Court pronouncements in *Swift & Co.* . . . and *Sam Fox Publishing* had been widely cited and followed by the lower courts. It is inconceivable that Congress was unaware of these pronouncements or that it intended for the courts to disregard the spirit of these two cases without even a hint of congressional disapproval of them.").

10a-11a, the court below quoted and followed the seminal Tunney Act case of *United States v. Gillette Co.*, 406 F. Supp. 713 (D. Mass. 1975). There, Judge Aldrich explained that the Government, not the court, was "settling the case" and that the Act required the court to perform only a limited review of the Executive Branch's decision to agree to the proposed consent order — to ensure that the Executive had acted in good faith, that parties with opposing views had been permitted to submit them, and that the government had made a "considered decision" to accept the consent decree. *Id.* at 715. Every other court interpreting the Tunney Act has followed *Gillette,*[20] and no court has ever accepted petitioners' proposed construction.

To make their argument, petitioners are forced to resort to piecing together snippets of legislative history. Petitioners seize on isolated phrases in floor statements and committee reports,[21] yet they ignore the bulk of the Act's history. The

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[20] *See also United States v. Alcan Aluminum, Ltd.*, 605 F. Supp. 619, 622 (W.D. Ky. 1985) ("The authority vested in this Court under the statute [the Tunney Act] is one of insuring that the Government has not breached its duty to the public in consenting to the Consent Decree. The Court is not required to determine whether the Decree is the one that will best serve society, but whether it is 'within the reaches of the public interest'"); *United States v. G. Heileman Brewing Co.*, 563 F. Supp. 642, 647 (D. Del. 1983) (repeating "reaches of the public interest" standard); *United States v. National Broadcasting Co., Inc.*, 449 F. Supp. 1127, 1143 (C.D. Cal. 1978); *United States v. Associated Milk Producers, Inc.*, 394 F. Supp. 29, 45 (W.D. Mo. 1975); *United States v. Stroh Brewery Co.*, 1982-2 Trade Cas. (CCH) ¶ 64,804, at 71,960 (D.D.C. 1982) (although under the Tunney Act "we are not sitting to 'rubber stamp' any proposed consent order, we will not substitute our judgment") (internal quotation omitted).

[21] Petitioners seize on one phrase in a lengthy Congressional Record statement by Senator Tunney: that courts are to exercise "an independent determination" in approving consent decrees. Pet. 16 n.26 (citing 119 Cong. Rec. 24597 (1973)). Of course, a court can — as the court below did — exercise independent judgment while still heeding the expertise of the Department of Justice. Moreover, in context it is clear that Sen. Tunney did not intend to create an unprecedented mechanism for district courts to review *de novo* the

House Report, for example, stressed Congress' "intention not to change case law construing the 'public interest' in cases involving the antitrust laws" and noted that "the phrase, 'public interest,' is a product of judicial construction." H.R. Rep. No. 1463, 93d Cong., 2d Sess. 11 (1974). "Preservation of antitrust precedent rather than innovation in the usage of the phrase, 'public interest,' is . . . unambiguous." *Id.; accord* S. Rep. No. 298, 93d Cong., 1st Sess. 3 (1973). Congress did not envision that district courts would conduct elaborate fact-finding missions in order to second-guess DOJ's determinations of the "public interest"; to the contrary, Congress recognized "the special expertise of the Attorney General in administering the antitrust laws." H.R. Rep. No. 1463, at 13. In short, even

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policy judgments of the Executive Branch. Rather, he aimed to codify and strengthen existing *procedures* for consent decree approval. He explained that "[t]he court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process." 119 Cong. Rec. 24598 (1973). He added that the bill "would not compel a hearing or a trial on the public interest issues. It only asks that the trial judge elicit the needed information through the least complicated and least time consuming means. Where the public interest can be meaningfully evaluated merely on the basis of good briefs and careful oral arguments, then that is the approach which should be followed." *Id.* at 24598-99. Senator Tunney stressed that the bill's "provisions add nothing which could in any way stymie or frustrate the efforts of the Department of Justice in carrying out its duties in the antitrust area." *Id.*

Several in Congress spoke of *open procedures*, not substantive review, as the solution to the perceived problem of judicial "rubber stamping." *See, e.g.*, 120 Cong. Rec. 36342 (1974) (remarks of Rep. Seiberling) ("too often the courts have, in fact, simply rubber-stamped [consent] agreements. . . . This bill remedies that by requiring a 60-day period, at the start of which the proposal has to be made public, and during which time comments can be submitted by interested parties to the Department of Justice, which must submit to the court what those comments and the responses thereto are."); *id.* at 36343-44 (remarks of Rep. Jordan) (noting the bill's "purpose [is] to ventilate the consent decree process" and expressing hope that this would "correct[] judicial rubber-stamping.") (emphasis added).

if petitioners' resort to legislative history is appropriate, these materials defeat rather than support their argument.

III. THERE IS NO REASON TO REVIEW THE COURT OF APPEALS' 1990 INTERPRETATION OF THE AT&T DECREE

Petitioners also seek certiorari on the question whether the D.C. Circuit erred in 1990 in holding in the *Triennial Review Opinion* that the "public interest" standard of Section VII rather than the "no substantial possibility" standard of Section VIII(C) governs unopposed modifications of the MFJ. Their argument on this score is a near-verbatim recitation of the arguments that they raised in 1990, that respondents refuted, and that this Court declined to hear when it denied certiorari. Petitioners seek a second bite at the apple on the ground that *one* of the objections to their prior petition was that review in 1990 was unnecessary because the information services case would again be subject to review by this Court at a later date. *See* Pet. 22 n.38.

Yet there were other, more basic reasons that the 1990 petition — and hence the second question presented in the instant petition — did not present an issue worthy of review by this Court. The fundamental reason was that the *Triennial Review* decision was plainly correct. Section VIII(C) simply provides that line-of-business restrictions "shall be removed upon a showing by the petitioning BOC" of particular market facts. As the *Triennial Review* court observed, it "does not purport to be the *exclusive* standard for reviewing restrictions," 900 F.2d at 306; Pet. App. 115a, and its reference to "petitioning BOC" appeared to contemplate Bell Company motions for modification where relief was *contested* by a party. In the *Triennial Review* case, of course, the *Department of Justice* had also moved to eliminate the information services restriction. Further confirming the fact that Section VIII(C) had been inserted to govern only *contested* modifications, the Court of Appeals noted that "[t]he trial court expressly noted that the standard in Section VIII(C) would supplant '[t]he test

usually applied to a *contested* modification . . . [as] set forth in *United States v. Swift & Co.*, [286 U.S. 106 (1932)].'" 900 F.2d at 306 (Court of Appeals' emphasis) (citation omitted); Pet. App. 116a. The *Triennial Review* court concluded that there was "little question that the parties expected uncontested motions to be governed by common law principles pursuant to section VII," and that "[t]he addition of section VIII(C) cannot be viewed as altering this interpretation." *Id.*; Pet. App. 115a-116a. Tellingly, no party to the decree questioned the Court of Appeals' interpretation; only various nonparties, which had been granted limited intervenor status by the district court, quarreled with it.

Moreover, even apart from its merits, the *Triennial Review* decision raised no legal questions of general interest. It interpreted one consent decree using conventional tools of construction set out by this Court. The analysis is tightly fact-bound, turning heavily on the wording of one section of the decree, the particulars of the parties' May 1982 filings in the district court, and detailed examinations of the text and a footnote on a page of the district court's 1982 opinion. 900 F.2d at 305-07; Pet. App. 113a-117a. There is nothing to distinguish the *Triennial Review Opinion* from the run-of-the-mill case involving the construction of decree provisions.

Petitioners' complaints against the *Triennial Review Opinion* rest entirely on distortions. It is not, as petitioners contend, in tension with *United States v. Atlantic Refining Co.*, 360 U.S. 19 (1959), which established nothing about appellate deference to a district court's construction of a decree. The *Atlantic Refining* Court simply agreed on the record "with the trial court," rejecting the Government's "strained" textual argument in the face of its "long-standing acquiescence" in the interpretation favoring the defendant, and explaining that the purposes of the applicable statutes did not "warrant our substantially changing the terms of a decree to which the parties consented without any adjudication of the issues." 360 U.S. at 22-23. The portions of the opinion surrounding the snippet quoted by petitioners make clear that *Atlantic Refining*

articulates not a rule of appellate review but a rule of decree construction — one that denies the Government, long after validating a reasonable interpretation of the decree that the district court believes was embraced by both parties, the power suddenly to urge a contrary view based on what it claims was its *real* reason for entering into the decree. *See id.* at 23-24. This principle is not implicated here.

Nor is there any "circuit conflict" based on the *Triennial Review* Court's decision not to defer to the district court's interpretation of a consent decree whose meaning was already plain in light of its text and contemporaneous history. 900 F.2d at 294, 306-07; Pet. App. 89a, 114a-117a. Even the circuits cited by petitioners as being "in conflict" routinely employ *de novo* review on consent decree interpretation issues,[22] and the particular cases cited by petitioners (Pet. 26 n.42) are distinguishable because they concern situations (unlike here) where the language and history of a decree are not dispositive.[23] Finally, there is no merit to petitioners'

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[22] *See, e.g., United States v. City of Northlake*, 942 F.2d 1164, 1167 (7th Cir. 1991) (citing *Triennial Review Opinion* with approval); *Jeff D. v. Andrus*, 899 F.2d 753, 759 (9th Cir. 1989) (making clear that under *Keith v. Volpe*, 784 F.2d 1457, 1461 (9th Cir. 1986) (cited by petitioners at Pet. 26), "[a] district court's interpretation of a consent judgment is a matter of law and freely reviewable on appeal"); *Stotts v. Memphis Fire Dept.*, 858 F.2d 289, 299 (6th Cir. 1988); *South v. Rowe*, 759 F.2d 610, 613 (7th Cir. 1985).

[23] In *AMF, Inc. v. Jewett*, 711 F.2d 1096, 1102 (1st Cir. 1983), the court cited "the usual considerations of contract interpretation" in *rejecting* a district court's view that decree provisions were "fatally ambiguous," although it stated that, "[i]n matters fairly open to debate, we have deferred to the conclusions of the district court." In *Ferrell v. Pierce*, 743 F.2d 454, 461 (7th Cir. 1984), there was no indication that anything turned on the court's apparent deference to the district court's view; in fact, the appellate court noted that "our primary goal must be to discern the intent of the parties as embodied in the agreement." In *Brown v. Neeb*, 644 F.2d 551, 558 & n.12 (6th Cir. 1981), the language of the decree was silent on the relevant issue. Indeed, it appears that the D.C. Circuit would consider extrinsic

suggestion that the *Triennial Review Opinion* is in conflict with prior practice under the MFJ.[24]

There was no reason to review the *Triennial Review Opinion* in 1990. There is even less reason to do so now, since the parties have operated for three years in reliance on the D.C. Circuit's interpretation of the MFJ, and since other decisions have incorporated into their analysis the difference between Section VII and Section VIII(C) originally set forth in the *Triennial Review Opinion*. *See, e.g., United States v. Western Electric Co.*, 969 F.2d 1231, 1232-33 (D.C. Cir. 1992), *cert. denied*, 113 S. Ct. 1363 (1993); *United States v. Western Electric Co.*, 907 F.2d 1205, 1209 (D.C. Cir. 1990). The interest in repose is great. Indeed, it is astonishing for petitioners to insist that the *Triennial Review Opinion* be discarded in the name of permitting "the *parties* [to] rely on the plain, intended, and settled meaning of decree provisions." Pet. 26 (emphasis added). The course sought by petitioners, none of whom was a party to the decree, and all of whom are merely limited intervenors in this case, works precisely against that end.

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evidence, including a district court's views, where the terms and history of a decree are not dispositive. *See United States v. Pollard*, 959 F.2d 1011, 1022-23 (D.C. Cir. 1992).

[24] Petitioners claim that, "in the years following entry of the decree, the [Bell Companies] filed well over 100 petitions . . . under Section VIII(C)." Pet. 24. In fact, early in the decree's history, the district court endorsed the parties' view of the Section VII public interest test by approving several waiver requests under it. *E.g., United States v. Western Electric Co.*, 569 F. Supp. 900, 1019 (D.D.C. 1983); *United States v. Western Electric Co.*, 578 F. Supp. 658, 660 (D.D.C. 1983). The Bell Companies continued to cite Section VII in subsequent requests, and this changed only when the district court decided for reasons of administrative convenience to require submission of all waiver requests to the Department of Justice for market analysis under the Section VIII(C) standard. *See United States v. Western Electric Co.*, 592 F. Supp. 846, 873-74 (D.D.C. 1984), *appeal dismissed*, 777 F.2d 23 (D.C. Cir. 1985).

CONCLUSION

The petition for a writ of certiorari should be denied.

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